

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

FILED BY *[Signature]* D.C.  
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CURTIS L. BYRD, JR.,

X

Plaintiff,

X

vs.

X

LESLIE I. BALLIN, et al.,

X

Defendants.

X

No. 04-2998-D/P

THOMAS M. GOULD  
CLERK, U.S. DISTRICT COURT  
WD OF TN MEMPHIS

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ORDER DENYING PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

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Plaintiff Curtis L. Byrd, Jr. commenced this action by filing a legal malpractice complaint in the Shelby County Circuit Court, docket number CT-005216-04, on September 13, 2004 against defendant Leslie I. Ballin, an attorney who represented Byrd in a federal criminal prosecution arising out of this district. See Notice of Removal, Ex. A. On or about November 15, 2004, plaintiff filed an amended complaint that, for the first time, added the National Bank of Commerce ("NBC") and three individuals, Sheila Burnett, Latoria Johnson, and Patricia Cook, as defendants. See Notice of Removal, Ex. B. NBC was served with the amended complaint on November 19, 2004 and removed this action to federal court, pursuant to 28 U.S.C. § 1446(d), on December 9, 2004.

On December 13, 2004, plaintiff filed a document, entitled "Application for Default Judgement Against Leslie I. Ballin," which purported to seek a summary judgment against Ballin because of his

This document entered on the docket sheet in compliance  
with Rule 58 and/or 79(a) FRCP on 8/26/05

8/26/05

failure to appear and defend the action. On December 14, 2004, the Clerk construed the filing as an application for entry of default pursuant to Fed. R. Civ. P. 55(a) and, as so construed, denied the application. On December 17, 2004, plaintiff filed an application for entry of default pursuant to Fed. R. Civ. P. 55(a), accompanied by a copy of the return of service on Ballin. The Clerk entered a default against Ballin on December 20, 2004.

On December 22, 2004, defendant Ballin filed a motion, pursuant to Fed. R. Civ. P. 55(c), to set aside the default, accompanied by a memorandum of law in which Ballin asserted that he has a meritorious defense to the action because the claim against him is time barred.<sup>1</sup> On December 28, 2004, plaintiff filed a motion for judgment on the pleadings, pursuant to Fed. R. Civ. P. 12(c) that, essentially, reiterates that he is entitled to summary judgment.<sup>2</sup> Ballin has not responded to this motion, and the time for a response has expired.

Pursuant to Fed. R. Civ. P. 12(c), "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Ballin's motion pursuant to Fed. R. Civ. P. 55(c) is not a "pleading," see Fed. R. Civ. P. 7(a), and the pleadings in this case are not closed. Accordingly, plaintiff

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<sup>1</sup> In a separate order, the Court granted Ballin's motion to set aside the default. That order did not address the merits of the plaintiff's claim against Ballin or Ballin's statute of limitations defense.

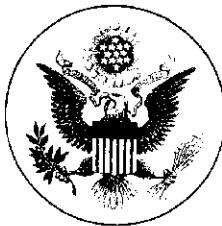
<sup>2</sup> The plaintiff had previously filed a summary judgment motion on December 13, 2004, which the Court denied in an order issued on February 4, 2005.

is not entitled to seek judgment on the pleadings. Plaintiff's motion is DENIED.

IT IS SO ORDERED this 22 day of August, 2005.



BERNICE B. DONALD  
UNITED STATES DISTRICT JUDGE



# Notice of Distribution

This notice confirms a copy of the document docketed as number 74 in case 2:04-CV-02998 was distributed by fax, mail, or direct printing on August 26, 2005 to the parties listed.

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Honorable Bernice Donald  
US DISTRICT COURT